RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

EX PARTE A. H. GARLAND.
JOHN A. CUMMINGS *v.* THE STATE OF MISSOURI.

Held, by the minority of the court, that the Act of Congress of January 24th 1865, prescribing an oath to be taken by attorneys, is *not* unconstitutional, nor is it void as being either a bill of attainder or an *ex post facto* law, its purpose being to require loyalty as one of the *qualifications* of those who practise law in the national courts, and not to impose a punishment for past acts of disloyalty.

The provisions of the National Constitution forbidding Congress and the states from passing bills of attainder and *ex post facto* laws, discussed, illustrated, and applied, by MILLER, J.

THE first case arose on motion for leave to practise as an attorney. The second came up on a writ of error to the Supreme Court of Missouri.

MILLER, J., dissenting:—

I dissent from the opinions of the court just announced.

It may be hoped that the exceptional circumstances which give present importance to these cases will soon pass away, and that those who make the laws both state and national, will find in the conduct of the persons affected by the legislation just declared to be void, sufficient reason to repeal, or essentially modify it.

For the speedy return of that better spirit, which shall leave us no cause for such laws, all good men look with anxiety, and with a hope, I trust, not altogether unfounded.

But the question involved, relating as it does to the right of the legislatures of the nation, and of the state, to exclude from offices and places of high public trust, the administration of whose functions is essential to the very existence of the government, those among its own citizens who have been engaged in a recent effort to destroy that government by force, can never cease to be one of profound interest.

It is at all times the exercise of an extremely delicate power for this court to declare that the Congress of the nation, or the legislative body of a state, has assumed an authority not belonging to it, and by violating the Constitution has rendered void its attempt at legislation. In the case of an act of Congress, which expresses the sense of the members of a co-ordinate department

of the government, as much bound by their oath of office as we are to respect that Constitution, and whose duty it is, as much as it is ours, to be careful that no statute is passed in violation of it, the incompatibility of the act with the Constitution should be so clear as to leave little reason for doubt, before we pronounce it to be invalid.

Unable to see this incompatibility, either in the Act of Congress or in the provision of the constitution of Missouri, upon which this court has just passed, but entertaining a strong conviction that both were within the competency of the bodies which enacted them, it seems to me an occasion which demands that my dissent from the judgment of the court, and the reasons for that dissent, should be placed on its records.

In the comments which I have to make upon these cases, I shall speak of principles equally applicable to both, although I shall refer more directly to that which involves the oath required of attorneys by the Act of Congress, reserving for the close some remarks more especially applicable to the oath prescribed by the constitution of the state of Missouri.

The Constitution of the United States makes ample provision for the establishment of courts of justice to administer her laws, and to protect and enforce the rights of her citizens. Article III., section 1, of that instrument says: that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish." Section 8 of article I. closes its enumeration of the powers conferred on Congress by the broad declaration that it shall have authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department thereof."

Under these provisions Congress has ordained and established Circuit Courts, District Courts, and Territorial Courts, and has by various statutes fixed the number of the judges of the Supreme Court. It has limited and defined the jurisdiction of all these, and determined the salaries of the judges who hold them. It has provided for their necessary officers, as marshals, clerks, prosecuting attorneys, bailiffs, commissioners, and jurors. And by the Act of 1789, commonly called the Judiciary Act, passed by the first Congress assembled under the Constitution, it is among

other things enacted: that "in all the courts of the United States, the parties may plead and manage their causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts respectively, shall be permitted to manage and conduct causes therein."

It is believed that no civilized nation of modern times has been without a class of men intimately connected with the courts, and with the administration of justice, called variously attorneys, counsellors, solicitors, proctors, and other terms of similar import. The enactment which we have just cited recognises this body of men, and their utility in the judicial system of the United States, and imposes upon the courts the duty of providing rules, by which persons entitled to become members of this class may be permitted to exercise the privilege of managing and conducting causes in these courts. They are as essential to the successful working of the courts, as the clerks, sheriffs, and marshals, and perhaps as the judges themselves, since no instance is known of a court of law without a bar.

The right to practise law in the courts as a profession is a privilege granted by the law, under such limitations or conditions in each state or government as the law-making power may prescribe. It is a privilege, and not an absolute right. The distinction may be illustrated by the difference between the right of a party to a suit in court to defend his own cause, and the right of another to appear and defend for him. The one, like the right to life, liberty, and the pursuit of happiness, is inalienable. The other is the privilege conferred by law on a person who complies with the prescribed conditions.

Every state in the Union, and every civilized government, has laws by which the right to practise in its courts may be granted, and makes that right to depend on the good moral character and professional skill of the party on whom the privilege is conferred. This is not only true in reference to the first grant of license to practise law, but the continuance of the right is made by these laws to depend upon the continued possession of those qualities.

Attorneys are often deprived of this right upon evidence of bad moral character, or specific acts of immorality or dishonesty, which show that they no longer possess the requisite qualifications.

All this is done by law, either statutory or common, and whether the one or the other, equally the expression of legislative

will, for the common law exists in this country only as it is adopted or permitted by the legislatures, or by constitutions.

No reason is perceived why this body of men, in their important relations to the courts of the nation, are not subject to the action of Congress, to the same extent that they are under legislative control in the states, or in any other government; and to the same extent that the judges, clerks, marshals, and other officers of the court are subject to congressional legislation. Having the power to establish the courts, to provide for and regulate the practice in those courts, to create their officers and prescribe their functions, can it be doubted that Congress has the full right to prescribe terms for the admission, rejection, and expulsion of attorneys, and for requiring of them an oath, to show whether they have the proper qualifications for the discharge of their duties?

The act which has just been declared to be unconstitutional is nothing more than a statute which requires of all lawyers who propose to practise in the national courts, that they shall take the same oath which is exacted of every officer of the government, civil or military. This oath has two aspects—one which looks to the past conduct of the party, and one to his future conduct—but both have reference to his disposition to support or to overturn the government, in whose functions he proposes to take part. In substance, he is required to swear that he has not been guilty of treason to that government in the past, and that he will bear faithful allegiance to it in the future.

That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me to be too clear for argument. The history of the Anglo-Saxon race shows that, for ages past, the members of the legal profession have been powerful for good or evil to the government. They are, by the nature of their duties, the moulders of public sentiment on questions of government, and are every day engaged in aiding in the construction and enforcement of the laws. From among their numbers are necessarily selected the judges who expound the laws and the Constitution. To suffer treasonable sentiments to spread here unchecked, is to permit the stream on which the life of the nation depends to be poisoned at its source.

In illustration of this truth, I venture to affirm, that if all the

members of the legal profession in the states lately in insurrection had possessed the qualification of a loyal and faithful allegiance to the government, we should have been spared the horrors of that rebellion. If, then, this qualification be so essential in a lawyer, it cannot be denied that the statute under consideration was eminently calculated to secure that result.

The majority of this court, however, do not base their decisions on the mere absence of authority in Congress, and in the states, to enact the laws which are the subject of consideration, but insist that the Constitution of the United States forbids, in prohibitory terms, the passage of such laws, both to the Congress and to the states. The provisions of that instrument, relied on to sustain this doctrine, are those which forbid Congress and the states, respectively, from passing bills of attainder and *ex post facto* laws. It is said that the Act of Congress, and the provision of the constitution of the state of Missouri under review, are in conflict with both these prohibitions, and are therefore void.

I will examine this proposition, in reference to these two clauses of the constitution, in the order in which they occur in that instrument.

1. In regard to bills of attainder, I am not aware of any judicial decision by a court of Federal jurisdiction which undertakes to give a definition of that term. We are therefore compelled to recur to the bills of attainder passed by the English Parliament, that we may learn so much of their peculiar characteristics, as will enable us to arrive at a sound conclusion, as to what was intended to be prohibited by the constitution.

The word attainder is derived, by Sir Thomas Tomlins, in his Law Dictionary, from the words *attincta* and *attinctura*, and is defined to be "the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law, on the pronouncing the sentence of death." The effect of this corruption of the blood was, that the party attainted lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance.

This attainder, or corruption of blood, as a consequence of judicial sentence of death, continued to be the law of England, in all cases of treason, to the time that our constitution was

framed, and, for aught that is known to me, is the law of that country, on condemnation for treason, at this day.

Bills of attainder, therefore, or acts of attainder, as they were called after they were passed into statutes, were laws which declared certain persons *attainted*, and their blood corrupted so that it had lost all heritable quality. Whether it declared other punishment or not, it was an act of attainder if it declared this. This also seems to have been the main feature at which the authors of the constitution were directing their prohibition; for after having, in article I., prohibited the passage of bills of attainder—in section 9 to Congress, and in section 10 to the states—there still remained to the judiciary the power of declaring attainders. Therefore, to still further guard against this odious form of punishment, it is provided, in section 3 of article III., concerning the judiciary, that, while Congress shall have power to declare the punishment of treason, no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

This, however, while it was the chief, was not the only peculiarity of bills of attainder which was intended to be included within the constitutional restriction. Upon an attentive examination of the distinctive features of this kind of legislation, I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned, which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government:

1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial.

2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognised rule of evidence governed the inquiry. (See Story on the Constitution, § 1344.)

It is no cause for wonder that men who had just passed successfully through a desperate struggle in behalf of civil liberty, should feel a detestation for legislation of which these were the prominent features. The framers of our political system had a full appreciа-

tion of the necessity of keeping separate and distinct the primary departments of the government. Mr. Hamilton, in the seventy-eighth number of the Federalist, says that he agrees with the maxim of Montesquieu, that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And others of the ablest numbers of that publication are devoted to the purpose of showing that in our constitution these powers are so justly balanced and restrained that neither will probably be able to make much encroachment upon the others. Nor was it less repugnant to their views of the security of personal rights, that any person should be condemned without a hearing, and punished without a law previously prescribing the nature and extent of that punishment. They therefore struck boldly at all this machinery of legislative despotism, by forbidding the passage of bills of attainder and *ex post facto* laws, both to Congress and to the states.

It remains to inquire whether, in the Act of Congress under consideration (and the remarks apply with equal force to the Missouri constitution), there is found any one of these features of bills of attainder, and if so, whether there is sufficient in the act to bring it fairly within the description of that class of bills.

It is not claimed that the law works a corruption of blood. It will therefore be conceded at once, that the act does not contain this leading feature of bills of attainder.

Nor am I capable of seeing that it contains a conviction or sentence, of any designated person or persons. It is said that it is not necessary to a bill of attainder that the party to be affected should be named in the act, and the attainder of the Earl of Kildare and his associates is referred to as showing that the act was aimed at a class. It is very true that bills of attainder have been passed against persons by some description, when their names were unknown. But in such cases the law leaves nothing to be done to render its operation effectual, but to identify those persons. Their guilt, its nature, and its punishment are fixed by the statute, and only their personal identity remains to be made out. Such was the case alluded to. The act declared the guilt and punishment of the Earl of Kildare, and all who were associated with him in his enterprise, and all that was required to insure their punishment was to prove that association.

If this were not so, then the act was mere *brutum fulmen*, and

the parties other than the earl could only be punished, notwithstanding the act, by proof of their guilt before some competent tribunal.

No person is pointed out in the Act of Congress, either by name or by description, against whom it is to operate. The oath is only required of those who propose to accept an office or to practise law; and as a prerequisite to the exercise of the functions of the lawyer, or the officer, it is demanded of all persons alike. It is said to be directed as a class to those alone who were engaged in the rebellion; but this is manifestly incorrect, as the oath is exacted alike from the loyal and disloyal, under the same circumstances, and *none* are compelled to take it. Neither does the act declare any conviction, either of persons or classes. If so, who are they, and of what crime are they declared to be guilty? Nor does it pronounce any sentence or inflict any punishment. If by any possibility it can be said to *provide* for conviction and sentence, though not found in the act itself, it leaves the party himself to determine his own guilt or innocence, and pronounce his own sentence. It is not, then, the Act of Congress, but the party interested, that tries and condemns. We shall see, when we come to the discussion of this act in its relation to *ex post facto* laws, that it inflicts no punishment.

A statute, then, which designates no criminal, either by name or description—which declares no guilt, pronounces no sentence, and inflicts no punishment—can in no sense be called a bill of attainder.

2. Passing now to consider whether the statute is an *ex post facto* law, we find that the meaning of that term as used in the constitution is a matter which has been frequently before this court, and it has been so well defined as to leave no room for controversy. The only doubt which can arise is as to the character of the particular case claimed to come within the definition, and not as to the definition of the phrase itself.

All the cases agree that the term is to be applied to criminal causes alone, and not to civil proceedings. In the language of Justice STORY, in the case of *Watson* v. *Mercer*, 8 Peters 88, "*ex post facto* laws relate to penal and criminal proceedings, which impose punishment and forfeiture, and not to civil proceedings, which affect private rights retrospectively:" *Calder* v. *Bull*, 3 Dallas 386; *Fletcher* v. *Peck*, 6 Cranch 87; *Ogden* v.

Saunders, 12 Wheat. 266; *Satterlee* v. *Matthewson*, 2 Peters 380.

The first case on the subject is that of *Calder* v. *Bull*, and it is the one in which the doctrine concerning *ex post facto* laws is most fully expounded. The court divides all laws which come within the meaning of that clause of the constitution into four classes:—

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2d. Every law that aggravates a crime, or makes it greater than it was when committed.

3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

4th. Every law that alters the rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offence to convict the offender.

Again, the court says, in the same opinion, that "the true distion is between *ex post facto* laws and retrospective laws," and proceeds to show that, however unjust the latter may be, they are not prohibited by the constitution, while the former are.

This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the constitution added to the classes of laws here set forth, as coming within that clause of the organic law. In looking carefully at these four classes of laws, two things strike the mind as common to them all—

1st. That they contemplate the trial of some person charged with an offence.

2d. That they contemplate a punishment of the person found guilty of such offence.

Now, it seems to me impossible to show that the law in question contemplates either the trial of a person for an offence committed before its passage, or the punishment of any person for such an offence. It is true that the act requiring an oath provides a penalty for falsely taking it. But this provision is prospective, as no one is supposed to take the oath until after the passage of the law. This prospective penalty is the only thing in the law which partakes of a criminal character. It is in all other respects a

civil proceeding. It is simply an oath of office, and it is required of all office-holders alike. As far as I am informed, this is the first time in the history of jurisprudence that taking an oath of office has been called a criminal proceeding. If it is not a criminal proceeding, then, by all the authorities, it is not an *ex post facto* law.

No *trial* of any person is contemplated by the act for any past offence. Nor is any party supposed to be charged with any offence in the only proceeding which the law provides.

A person proposing to appear in the court as an attorney is asked to take a certain oath. There is no charge made against him that he has been guilty of any of the crimes mentioned in that oath. There is no prosecution. There is not even an implication of guilt by reason of tendering him the oath, for it is required of the man who has lost everything in defence of the government, and whose loyalty is written in the honorable scars which cover his body, the same as of the guiltiest traitor in the land. His refusal to take the oath subjects him to no prosecution. His taking it clears him of no guilt, and acquits him of no charge.

Where, then, is this *ex post facto* law, which tries and punishes a man for a crime committed before it was passed? It can only be found in those elastic rules of construction which cramp the powers of the Federal Government when they are to be exercised in certain directions, and enlarge them when they are to be exercised in others. No more striking example of this could be given than the cases before us, in one of which the Constitution of the United States is held to confer no power on Congress to prevent traitors practising in her courts, while in the other it is held to confer power on this court to nullify a provision of the constitution of the state of Missouri, relating to a qualification required of ministers of religion.

But the fatal vice in the reasoning of the majority is in the meaning which they attach to the word punishment, in its application to this law, and in its relation to the definitions which have been given of the phrase *ex post facto* laws.

Webster's second definition of the word punish is this: "In a loose sense, to afflict with punishment, &c., with a view to amendment; to chasten." And it is in this loose sense that the word is used by this court, as synonymous with chastisement, correction,

loss, or suffering to the party supposed to be punished, and not in the legal sense, which signifies a penalty inflicted for the commission of a crime.

And so, in this sense, it is said that whereas persons who had been guilty of the offences mentioned in the oath were, by the laws then in force, only liable to be punished with death and confiscation of all their property, they are by a law passed since these offences were committed, made liable to the enormous additional punishment of being deprived of the right to practise law.

The law in question does not in reality deprive a person guilty of the acts therein described of any right which he possessed before; for it is equally sound law, as it is the dictate of good sense, that a person who, in the language of the act, has voluntarily borne arms against the government of the United States while a citizen thereof, or who has voluntarily given aid, comfort, counsel, or encouragement to persons engaged in armed hostility to the government, has, by doing those things, forfeited his right to appear in her courts and take part in the administration of her laws. Such a person has exhibited a trait of character which, without the aid of the law in question, authorizes the court to declare him unfit to practise before it, and to strike his name from the roll of its attorneys if it be found there.

I have already shown that this act provides for no indictment or other charge, that it contemplates and admits of no trial, and I now proceed to show that even if the right of the court to prevent an attorney, guilty of the acts mentioned, from appearing in its forum, depended upon the statute, that still it inflicts no punishment in the legal sense of that term.

Punishment, says Mr. Wharton in his Law Lexicon, is "the penalty for transgressing the laws;" and this is, perhaps, as comprehensive and at the same time as accurate a definition as can be given. Now what law is it whose transgression is punished in the case before us? None is referred to in the act, and there is nothing on its face to show that it was intended as an additional punishment for any offence described in any other act. A part of the matters of which the applicant is required to purge himself on oath may amount to treason, but surely there could be no intention or desire to inflict this small additional punishment for

a crime whose penalty already was death and confiscation of property.

In fact the word punishment is used by the court in a sense which would make a great number of laws, partaking in no sense of a criminal character, laws for punishment, and therefore *ex post facto*.

A law, for instance, which increased the facility for detecting frauds by compelling a party to a civil proceeding to disclose his transactions under oath would result in his punishment in this sense, if it compelled him to pay an honest debt which could not be coerced from him before. But this law comes clearly within the class described by this court in *Watson* v. *Mercer*, as civil proceedings which affect private rights retrospectively.

Again, let us suppose that several persons afflicted with a form of insanity heretofore deemed harmless, shall be found all at once to be dangerous to the lives of persons with whom they associate. The state, therefore, passes a law that all persons so affected shall be kept in close confinement until their recovery is assured. Here is a case of punishment in the sense used by the court for a matter existing before the passage of the law. Is it an *ex post facto* law? And if not, in what does it differ from one? Just in the same manner that the Act of Congress does, namely, that the proceeding is civil and not criminal, and that the imprisonment in the one case and the prohibition to practise law in the other, are not punishments in the legal meaning of that term.

The civil law maxim, "*Nemo debet bis vexari pro uno et eadam causa*," has been long since adopted into the common law as applicable both to civil and criminal proceedings, and one of the amendments of the Constitution incorporates this principle into that instrument so far as punishment affects life or limb. It results from this rule, that no man can be twice lawfully punished for the same offence. We have already seen that the acts of which the party is required to purge himself on oath constitute the crime of treason. Now if the judgment of the court in the cases before us, instead of permitting the parties to appear without taking the oath, had been the other way, here would have been the case of a person who, on the reasoning of the majority, is punished by the judgment of this court for the same acts which constitute the crime of treason.

Yet if the applicant here, should afterwards be indicted for

treason on account of these same acts, no one will pretend that the proceedings here could be successfully pleaded in bar of that indictment. But why not? Simply because there is here neither trial or punishment within the legal meaning of these terms.

I maintain that the purpose of the Act of Congress was to require loyalty as a qualification of all who practise law in the national courts. The majority say that the purpose was to impose a punishment for past acts of disloyalty.

In pressing this argument it is asserted by the majority that no requirement can be justly said to be a qualification which is not attainable by all, and that to demand a qualification not attainable by all is a punishment.

The Constitution of the United States provides as a qualification for the offices of President and Vice-President, that the person elected must be a native-born citizen. Is this a punishment to all those naturalized citizens who can never attain that qualification? The constitutions of nearly all the states require as a qualification for voting that the voter shall be a *white male* citizen. Is this is a punishment for all the blacks who can never become white?

Again, it was a qualification required by some of the state constitutions for the office of judge, that the person should not be over sixty years of age. To a very large number of the ablest lawyers in any state this is a qualification to which they can never attain, for every year removes them farther away from the designated age. Is it a punishment?

The distinguished commentator on American law, and chancellor of the state of New York, was deprived of that office by this provision of the constitution of that state, and he was thus, in the midst of his usefulness, not only turned out of office, but he was for ever disqualified from holding it again by a law passed after he had accepted the office.

This is a much stronger case than that of a disloyal attorney forbidden by law to practise in the courts, yet no one ever thought the law was *ex post facto* in the sense of the Constitution of the United States.

Illustrations of this kind could be multiplied indefinitely, but they are unnecessary.

The history of the time when this statute was passed—the darkest hour of our great struggle—the necessity for its exist-

ence, the humane character of the President who signed the bill, and the face of the law itself, all show that it was purely a qualification, exacted in self-defence, of all who took part in administering the government in any of its departments, and that it was not passed for the purpose of inflicting punishment, however merited, for past offences.

I think I have now shown that the statute in question is within the legislative power of Congress in its control over the courts and their officers, and that it was not void as being either a bill of attainder or an *ex post facto* law.

If I am right on the questions of qualification and punishment, that discussion disposes also of the proposition, that the pardon of the President relieves the party accepting it of the necessity of taking the oath, even if the law be valid.

I am willing to concede that the presidential pardon relieves the partv from all the penalties, or in other words from all the punishment, which the law inflicted for his offence. But it re lieves him from nothing more. If the oath required as a condition to practising law is not a punishment, as I think I have shown it is not, then the pardon of the President has no effect in releasing him from the requirement to take it. If it is a qualification which Congress had a right to prescribe as necessary to an attorney, then the President cannot, by pardon or otherwise, dispense with the law requiring such qualification.

This is not only the plain rule as between the legislative and executive departments of the government, but it is the declaration of common sense. The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor at law, may be saved by the executive pardon from the penitentiary or the gallows, but is not thereby restored to the qualifications which are essential to admission to the bar. No doubt it will be found that very many persons among those who cannot take this oath, deserve to be relieved from the prohibition of the law; but this in no wise depends upon the act of the President in giving or refusing a pardon. It remains to the legislative power alone to prescribe under what circumstances this relief shall be extended.

In regard to the case of *Cummings* v. *The State of Missouri*, allusions have been made in the course of argument to the sanctity

of the ministerial office, and to the inviolability of religious freedom in this country.

But no attempt has been made to show that the Constitution of the United States interposes any such protection between the state governments and their own citizens. Nor can anything of this kind be shown. The Federal Constitution contains but two provisions on this subject. One of these forbids Congress to make any law respecting the establishment of religion, or prohibiting the free exercise thereof. The other is, that no religious test shall ever be required as a qualification to any office or public trust under the United States.

No restraint is placed by that instrument on the action of the states; but on the contrary, in the language of Story (Commentaries on the Constitution, § 1878), "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice and the state constitutions."

If there ever was a case calling upon this court to exercise all the power on this subject which properly belongs to it, it was the case of the Rev. B. Permoli, reported in 3 Howard 589.

An ordinance of the first municipality of the city of New Orleans imposed a penalty on any priest who should officiate at any funeral, in any other church than the obituary chapel. Mr. Permoli, a Catholic priest, performed the funeral services of his church over the body of one of his parishioners, inclosed in a coffin, in the Roman Catholic church of St. Augustine. For this he was fined, and relying upon the vague idea advanced here, that the Federal Constitution protected him in the exercise of his holy functions, he brought the case to this court.

But hard as that case was, the court replied to him in the following language: "The constitution (of the United States) makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the states." Mr. Permoli's writ of error was, therefore, dismissed for want of jurisdiction.

In that case an ordinance of a mere local corporation forbade a priest, loyal to his government, from performing what he believed to be the necessary rites of his church over the body of his departed friend. This court said it could give him no relief.

In this case the constitution of the state of Missouri, the fundamental law of the people of that state, adopted by their popular vote, declares that no priest of any church shall exercise his ministerial functions, unless he will show, by his own oath, that he has borne a true allegiance to his government. This court now holds this constitutional provision void, on the ground that the Federal Constitution forbids it. I leave the two cases to speak for themselves.

In the discussion of these cases I have said nothing, on the one hand, of the great evils inflicted on the country by the voluntary action of many of those persons affected by the laws under consideration: nor on the other hand, of the hardships which they are now suffering, much more as a consequence of that action than of any laws which Congress can possibly frame. But I have endeavored to bring to the examination of the grave questions of constitutional law involved in this inquiry those principles alone which are calculated to assist in determining what the law is, rather than what, in my private judgment, it ought to be.

I am authorized to say that the Chief Justice, and Justices SWAYNE and DAVIS, concur in this opinion.

In the March No. of the REGISTER, ante, p. 284, we published the opinion of the majority of the Supreme Court, delivered by Mr. Justice FIELD in the case of EX PARTE GARLAND.

In the brief note which accompanied it, we stated the substance of the majority opinion in the case of CUMMINGS *v.* THE STATE OF MISSOURI, to be that the oath established by the Constitution of Missouri, was not merely a test of *qualifications* for certain offices or professions, but was in its nature essentially *punitive*, and, therefore, contrary to the provision of the Constitution of the United States, which declares that no state shall pass a bill of attainder or *ex post facto* law.

The readers of the REGISTER have thus been advised not only of the views held by the majority, but of the arguments by which these views are supported. Four of the nine judges, including the Chief Justice, dissented, and the dissenting opinion was delivered by Mr. Justice MILLER, which we herewith publish.

Upon a question on which the highest judicial authorities in the land are so evenly divided, it must be expected that every lawyer will feel himself free to form his own opinion, and in compliance, therefore, with the wishes of many of our readers, we have procured an official copy of the opinion of Justice MILLER, as the ablest as well as the most authoritative presentation of the arguments in favor of the validity of the Act of Congress; so that the profession may hear both sides and make up an opinion, as nearly as may be, on grounds of pure reason. The great questions of constitutional law which are discussed, and the absorbing public and professional interest which attaches to the principles involved, justify the extended space given to this subject.

The decision of the same or similar

points, however, has recently been forced upon other courts, and it is proper to take notice briefly of the results of independent investigation, by able judges, of the general powers of the legislative and judicial departments of government over the privileges of attorneys as a class.

I. In EX PARTE LAW, before the District Court of the United States for the District of Georgia, the facts were as follows:—William Law was admitted as an attorney to the bar of the Circuit and District Courts of the United States in 1817; he had since the close of the war received a grant of pardon and amnesty from the President under the proclamation of May 29th 1865, and had taken the oath of amnesty. Upon these facts he applied for leave to appear and plead as an attorney in this court without taking the oath prescribed by the Act of Congress of January 24th 1865. The application was made and the motion argued and decided at the May Term 1866, but the decision withheld for a time out of respect to the Supreme Court of the United States, where the same question was then pending.

The court (ERSKINE, J.) was of opinion—

1. That attorneys are not strictly *public officers* at common law, nor have they been considered such by Congress. The court referred especially to the clause in the Constitution of the United States (Art. I. § 7) that "no person holding any office under the United States shall be a member of either house during his continuance in office," and to various Acts of Congress in this connection.

2. That the admission of an attorney is a judicial act.

3. That an attorney has not technically a *property* in his profession.

4. That the Act of Congress prescribing the test oath is a penal act, and therefore, as applied to the case of an attorney already once admitted to the bar, it is *ex post facto*, and therefore unconstitutional.

II. In EX PARTE HUNTER ET AL. and BOGGESS ET AL., at the January Term 1867, the subject came before the Court of Appeals of West Virginia. By the Act of the Legislature of West Virginia, passed February 14th 1866, no attorney shall be allowed to practise in any court of that state until he shall take an oath that he has not since the 20th of June 1863 (the date of admission of the state into the Union) borne arms against the state or the United States, nor voluntarily given aid or comfort to persons engaged in armed hostility thereto, by counselling or encouraging them in the same; that he has not sought or accepted or attempted to exercise any office under any government in hostility to the United States or the state of West Virginia, and that he has not yielded a voluntary support to any pretended government within the United States, hostile thereto.

The petitioners now moved to be allowed to practise without taking this oath. Hunter and the others, except Boggess, were regularly licensed attorneys of the state of Virginia at the time of the breaking out of the rebellion, and were resident then and now in the territory embraced by the state of West Virginia. They took part in the rebellion until the surrender of General Lee, and have since been pardoned by the President, but had never been admitted as attorneys to the courts of West Virginia. Mr. Boggess, however, had taken no part in the rebellion and was an attorney of this court already in practice, and declared his ability to take the oath, but objected for other reasons.

The court, by BROWN and LOOMIS, JJ., delivered elaborate opinions, considering the whole subject and showing—

1. The peculiar position of West Virginia, as engaged not only in assisting the United States to preserve the Union,

but waging a war of self-defence on her own account against her Confederate invaders.

2. That the act in question was passed as a war measure.

3. That by the laws of war the belligerent government had a right to declare the property of its enemies forfeited, and that even conceding the privilege of an attorney to be property, the state had a right under the circumstances to declare it forfeited, and the pardon of the President of the United States, whatever its effect upon the privileges of the petitioners as citizens of the United States, did not restore any privileges originally dederived from, and subsequently taken away, by the government of a state.

The court then considered the general authority of the legislature and the court over the admission of attorneys, and were of opinion that the act in question was constitutional.

In respect to the other class of petitioners, BOGGESS ET AL., the court, after a full consideration of the subject, were of opinion that the act in question was not in any legal sense an *ex post facto* law or bill of attainder, and that the admission of an attorney was not such a *contract* between him and the state as comes within the constitutional prohibition to the states from impairing the obligation of contracts.

J. T. M.

Supreme Court of Vermont.

WILLIAM H. CARTER *v.* W. H. M. HOWARD.

Where a physician renders professional services to a married woman at her request and expressly upon her credit, while she is living apart from her husband, he cannot afterwards recover in *assumpsit* against the husband.

THIS was an action of *assumpsit* to recover pay for services as a physician rendered by the plaintiff to the defendant's wife.

The case had been referred by rule of court, and was now before the court upon the facts found and reported by the referee.

Ormsby, Dickey & Worthen, for the plaintiff, cited 1 Pars. Contr. 288–291; *Read* v. *Legard*, 4 L. & Eq. 523; 2 Kent Com. 148; *Day* v. *Burnham*, 36 Vt. 37; *Black* v. *Bryan*, 18 Texas 453.

Hebard & Farnham, for the defendant, cited 20 Eng. L. & Eq. 345, and cases cited in note; *Sawyer* v. *Cutting*, 23 Vt. 486; *Patterson* v. *Gandasequi*, 15 East 62; *Addison* v. *Same*, 4 Taunt. 574; 32 Ala. 227; 18 Conn. 417; Dunlap's Paley's Agency 247–9, *in notis*.

The opinion of the court was delivered by